# No. 82-1724

In The

## Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

*Petitioner,*

vs.

ROBERT UPLINGER and SUSAN BUTLER,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

## BRIEF FOR PETITIONER

RICHARD J. ARCARA
*District Attorney*
*Erie County*
*Attorney for Petitioner*
200 Erie County Hall
25 Delaware Avenue
Buffalo, New York 14202
(716) 855-2424

JOHN J. DeFRANKS
LOUIS A. HAREMSKI
JO W. FABER
*Assistant District Attorneys*
*Of Counsel*

## QUESTION PRESENTED

Where public solicitations to engage in deviate sexual acts are either unprotected or only minimally protected by the First Amendment to the Constitution, and where the State has a compelling interest in the protection of its citizenry from public invitations to engage in abnormal sexual behavior which have been legislatively perceived as annoying or harassing, does New York Penal Law §240.35 subd. 3 which prohibits loitering for the purpose of engaging or soliciting another to engage in deviate sexual intercourse or other deviate sexual activities represent a constitutionally valid exercise of the State's power to control public order?

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**ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS**

## BRIEF FOR PETITIONER

The Erie County District Attorney, on behalf of the People of the State of New York, seeks reversal of a judgment of the New York State Court of Appeals. By that judgment, a divided Court of Appeals (6-1) reversed a judgment of the Erie County Court which had affirmed the conviction of Robert Uplinger for Loitering for Deviate Sexual Purposes (New York Penal Law §240.35 subd. 3) and reversed the dismissal of a charge against Susan Butler under the same section.

## OPINIONS BELOW

The memorandum decision of the New York State Court of Appeals (App. B, 1b-13b)[1] is reported at 58 N.Y.2d 936, 460

[1] References to appendices A, B, C, D and E are to the appendices to the petition for a writ of certiorari.

N.Y.S.2d 514, 447 N.E.2d 62 (1983). The memorandum and order of the Erie County Court (McCarthy, J.) dated May 3, 1983 (App. C, 1c-8c) is reported at 113 Misc.2d 876, 449 N.Y.S.2d 916 (County Court, Erie County, 1982). The memorandum and order of Buffalo City Court (Drury, J.) with respect to Respondent Uplinger dated November 9, 1981 (App. D, 1d-14d) is reported at 111 Misc.2d 403, 444 N.Y.S.2d 373 (Buffalo City Court, 1981). The memorandum and order of Buffalo City Court (Drury, J.) with respect to Respondent Butler dated September 8, 1981 (App. E, 1e-8e) is reported at 110 Misc.2d 843, 443 N.Y.S.2d 40 (Buffalo City Court, 1981).

## JURISDICTION

The judgment of the New York State Court of Appeals was entered on February 23, 1983 (App. A). The petition for a writ of certiorari was filed on April 22, 1983, and this Court granted the petition by order dated October 3, 1983. The Petitioner sought review not only with respect to New York's Loitering statute (Penal Law §240.35 subd. 3), but also requested review with respect to the validity of New York's Consensual Sodomy statute (Penal Law §130.38) and the earlier New York Court of Appeals decision in *People v. Onofre,* 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), which held such statute to be unconstitutional. Since this Court denied certiorari in the *Onofre* case, 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845, and since the order granting certiorari herein is silent with respect to any willingness on the part of the Court to review the issue litigated in *Onofre,* petitioner does not specifically deal with the validity of that statute or the propriety of that decision.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### NEW YORK STATE PENAL LAW

§240.35 Loitering

A person is guilty of loitering when he:

* * *

3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature; . . .

* * *

Loitering is a violation.

## STATEMENT OF THE CASE

### PEOPLE V. UPLINGER

Respondent Robert Uplinger was arrested on August 7, 1981 for the offense of Loitering pursuant to New York State Penal Law §240.35 subd. 3 (103-105)[2].

Officer Steven Nicosia, assigned to the Bureau of Vice Investigation of the Buffalo Police Department, was working undercover in the vicinity of 140 North Street in the City of Buffalo, New York (104). While in the area, characterized as a quiet residential neighborhood (33, 45), Nicosia was approached by Uplinger, who engaged the officer in conversation (104). In the course of the conversation a group of individuals, including Nicosia and Uplinger, who had congregated on the steps of 140 North Street, were ordered to disperse by other police officers. As Nicosia walked away, he was pursued by Uplinger, who asked whether Nicosia wanted to come to his apartment. Nicosia responded in the negative. The encounter, which lasted approximately ten minutes, was continued by Uplinger even though Nicosia indicated that he was afraid of the police and wanted to leave. In spite of these apparent attempts to discourage any further contact, Uplinger offered:

> "Well if you drive me over to my place or go over to my place I'll blow you." (104)

Uplinger was thereafter placed under arrest for a violation of Penal Law §240.35 subd. 3 (105).

A hearing was held to elicit facts regarding a variety of considerations, including the character of the neighborhood where these acts were alleged to have taken place. At the hearing, it was determined that residents were apprehensive about walking in the neighborhood, particularly past groups of homosexuals (22, 35), and had been inconvenienced by the sounds of idling cars and indiscreet conversations (35, 48, 51). Individuals waiting for the bus had been propositioned for

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[2]Numbers in parentheses refer to pages of Joint Appendix.

homosexual acts (50). A city councilman, who was parked in the neighborhood waiting for his son, was solicited by a male prostitute (51-52). Of concern was the connection between homosexual encounters and prostitution activities (43, 98-102). It was stated by a vice officer that the displacement of homosexual prostitutes from one area of the city resulted in their relocation to North Street where homosexual activity already flourished (102).

After the hearing and non-jury trial, Buffalo City Court Judge Timothy J. Drury denied respondent's motion to dismiss the accusatory instrument on the ground that the statute was unconstitutional and found respondent guilty as charged. Uplinger was sentenced to pay a fine of $100.00.

PEOPLE V. BUTLER

Respondent Susan Butler, a known prostitute, was arrested on April 1, 1981 for the offense of Loitering pursuant to New York State Penal Law §240.35 subd. 3 (1-2).

The arrest occurred after Officer Kenneth Burgstahler, assigned to the Bureau of Vice Investigation of the Buffalo Police Department, observed Butler for a period of approximately ten minutes during which time she was seen waving at passing cars and attempting to stop three or four vehicles (3). At one point she engaged in a conversation with the driver of an automobile and, after two or three minutes, entered the automobile. When the vehicle backed down a side street, Burgstahler circled the block, located the car and observed the respondent committing an act of oral sodomy on the driver. Both participants were thereafter arrested for loitering to commit a deviate sexual act (2).

Respondent entered a plea of not guilty and a hearing was thereafter held with respect to her motion to dismiss the accusatory instrument on the ground that the statute was un-

constitutional. By an undated memorandum and subsequent order dated October 8, 1981, Buffalo City Court Judge Timothy J. Drury granted respondent's motion and dismissed the charge.

## THE APPEALS

Appeals from each of the determinations were properly taken to the County Court of Erie County. In a memorandum and order applicable to both cases dated May 3, 1982 (App. C), Erie County Court Judge Joseph P. McCarthy affirmed the conviction of Respondent Uplinger and reversed the determination with respect to Respondent Butler, reinstating the charge. Leave to appeal to the New York Court of Appeals was granted. Respondents claimed on appeal that their right to due process and their freedoms of speech and association had been violated. The New York Court of Appeals found the statute to be unconstitutional.

## JUDGMENT BELOW

In a memorandum decision, a divided New York Court of Appeals (Jasen, J., dissenting) summarily held that New York's Loitering statute (Penal Law §240.35 subd. 3) was unconstitutional. The holding was based upon the court's earlier decision in *People v. Onofre,* 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. den. 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845, which had determined New York's Consensual Sodomy statute (Penal Law §130.38) to be unconstitutional. Having previously ruled that the State could not constitutionally prohibit sexual behavior conducted in private between consenting adults, the court thus concluded that it could not prohibit public acts anticipatory to such conduct.

Although the Court of Appeals noted that the Legislature could have prohibited an individual from accosting another in an offensive manner or an inappropriate place, or could have

prohibited the solicitation of an act to be performed in public, the absence of some requirement of intent on the part of the solicitor or annoyance on the part of the solicitee rendered the statute defective. In conceding the ability of the Legislature to enact such a statute, the court acknowledged the compelling state interest to be served by such legislation.

Despite an explicit disavowal by the majority that its decision was based upon constitutional overbreadth considerations, the dissent, in a thorough and well-reasoned opinion, concluded that such could be the only basis on which the majority decision was founded. The lone dissenter, Judge Jasen, claimed that the majority failed in its judicial obligation to employ the overbreadth doctrine only sparingly and only when a limiting construction is unavailable. By utilizing the doctrine, the majority accorded First Amendment protection to the respondents' public solicitations and declined to limit the application of the statute.

Judge Jasen, although concurring with the majority in *Onofre, supra,* split from his brethren in the present case and noted that the earlier decision "in no way limited the Legislature's ability to regulate public conduct, at best anticipatory to later private conduct." (App. B, 3b). He clearly recognized the ability of the Legislature to enact such a statute and the rational basis therefor.

Also rejected was a claim of vagueness since, in the dissenter's view, the statute gives a person of ordinary intelligence fair notice of what is forbidden. In essence, the dissent concluded that the statute represented a valid exercise of the legislative power of the State and did not impermissibly infringe upon any protected rights.

## SUMMARY OF ARGUMENT

In promulgating Penal Law §240.35 subd. 3, the New York State Legislature was attempting to safeguard the public order by prohibiting public loitering for the purpose of engaging in or soliciting another to engage in deviate sexual activity. As indicated by the testimony in the proceedings below, such street solicitations not only cause affront to unreceptive solicitees, but are a source of concern to parents whose children are indiscriminately solicited and business proprietors who feel that the presence of persons soliciting deviate sexual activities creates an atmosphere of intimidation detrimental to their interests.

Based upon an analysis of both the content and the context of the speech at issue, it is argued that such speech is not entitled to the protection normally accorded by the First Amendment. The speech at issue, undeniably lewd, bears no relationship to the active exposition and exchange of ideas sought to be nurtured by the free speech provisions of the Constitution, nor do the circumstances of such speech, i.e. that it is forced upon another in a public place, provide a basis for any form of protection.

In the event that such speech is accorded some degree of protection by this Court, it is asserted that the State's compelling interest in preventing the harm caused by public solicitation for deviate sexual activity is adequate to justify the regulatory statute under consideration. The First Amendment safeguards more than the right of one to say, publish or distribute what he wishes; it protects, as well, the right of one to choose what he wishes to hear or not hear. Although the offending language is uttered in a public place, both the unwilling solicitee and the unwilling bystander are unable to escape the potential assault upon moral sensibilities that the speech under consideration represents. Inasmuch as the State has a valid purpose in preventing acts of harassment and indiscriminate

intrusion upon the privacy of its citizenry, it has a legitimate interest in exercising its authority to regulate such behavior.

The State has an equally compelling interest in safeguarding the well-being of its children, some of whom are inevitably involved either as objects of solicitation or as solicitors. Prohibition of solicitation serves, albeit in different ways, to protect both groups of minors.

Lastly, the State's interest in regulating activities which constitute a public nuisance is also compelling when measured against the effects of such solicitation upon the community. Manifest is the apprehensiveness of both residents and business invitees who hesitate to utilize public accessways overtaken by congregating solicitors. Exacerbating the harm caused by solicitation is the fact that such solicitation often coincides with other criminal activity, in particular male and female prostitution.

It is contended that the New York statute in no way abridges the right of any persons to associate freely with others. There are many and diverse alternatives to public solicitation which are protected by the Constitution. Such alternatives are broad enough to permit the identification of persons who would be receptive to a private solicitation, thereby minimizing the potential harm to both solicitee and passerby of an indiscriminate public solicitation. Accordingly, the statute at issue can clearly exist without derogation of any individual's legitimate right to associate with others.

Due to the close relationship between the language of the statute and the State's permissible objective in protecting the public order, and further due to the absence of a substantial infringement upon protected activity, the statute cannot be termed overbroad. Nor is it underinclusive merely because it fails to regulate solicitation for normal sexual intercourse in the same manner as solicitation for deviate sexual acts, in view of the rational state purpose in delineating such classifications and

the unprotected nature of public sexual solicitations in general. Finally, because the conduct of the respondents was unquestionably embraced by the clear language of the statute, they should not be heard to argue that said statute is void for vagueness.

## POINT

**New York State Penal Law Section 240.35 subd. 3 represents a valid exercise of the State's power to control public order.**

### Introduction

Under the Laws of 1965, the New York Penal Law, effective September 1, 1967, included under Article 240, Offenses Against Public Order, Section 240.35 subd. 3:

> Loitering
>
> A person is guilty of loitering when he:
>
> * * *
>
> 3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature;
>
> * * *
>
> Loitering is a violation.

The statute, directed specifically against public behavior, proscribes both loitering for the purpose of soliciting and loitering for the purpose of engaging in deviate intercourse or other deviate sexual behavior.

"Deviate sexual intercourse" is defined by §130.00 subd. 2 of the New York Penal Law as sexual contact between persons not married to each other consisting of contact between the penis and anus, the mouth and penis, or the mouth and vulva.

"Other sexual behavior of a deviate nature," although not statutorily defined, is by common usage understood as sexual conduct "characterized by or given to significant departure from the behavioral norms" of society. *(Webster's Third New International Dictionary of the English Language, Unabridged,* 14*th* ed., (1961), s.v. "deviate.")

The New York Court of Appeals concerned itself exclusively with the proscription against loitering for the purpose of soliciting one to engage in deviate sexual intercourse. The court concluded, based upon its decision in *People v. Onofre,* 51 N.Y.2d 476, 434 N.Y.S.2d 947, 414 N.E.2d 936 (1980), cert. den. *New York v. Onofre,* 451 U.S. 987, 101 S. Ct. 2323, 68 L.Ed.2d 845 (1981), which decriminalized deviate sexual intercourse carried on in private by consenting adults, that the conduct contemplated by Penal Law §240.35 subd. 3 could not be deemed criminal and thus, was not subject to the State's regulation.

What the court ignored in its assessment of the purview of the statute is that in addition to deviate sexual intercourse, the statute contemplates loitering for purposes relating to "other" distinctive conduct of a "deviate sexual nature," certain incidents of which *have* been deemed criminal by the Legislature. Such conduct obviously includes acts of bestiality and necrophilia (*see* Penal Law §130.20 subd. 3), acts involving the insertion of a foreign object into the vagina, urethra, penis or rectum (*see* Penal Law §130.70), acts of sexual sadism or masochism (*see* Penal Law §§120.00, 120.05 and 120.10 dealing with assault; *see also* Penal Law Article 130 specifically as it deals with offenses against those who are unable to consent due to age or mental deficiency), all unquestionably "deviate" by any definition.

In the discussion that follows relative to the purpose and intent of the Legislature and the interest of the State sought to be protected, it is recognized that Penal Law §240.35 subd. 3 is

concerned with loitering for purposes of participating in or soliciting another's participation in criminal as well as non-criminal acts.

**First Amendment Protection**

It is asserted that the New York State prohibition of public loitering for the purpose of soliciting or engaging in deviate sex (New York Penal Law §240.35 subd. 3) represents, both on its face and in its application, a valid exercise of state power to control public order. Undeniably, if a statute of this nature involves a restraint on speech which is protected by the First Amendment, it must be closely scrutinized to determine whether the State's interest in regulation is sufficiently compelling to overcome generalized First Amendment protections. *Young v. American Mini-Theatres,* 427 U.S. 50, 57, 96 S.Ct. 2440, 2446, 49 L.Ed.2d 310, 318 (1976). If, however, the speech is not protected, a less stringent standard, based upon the State's power to protect the well-being and tranquility of the community, can be employed. Within precise constitutional limitations, a state or city may prohibit acts or things reasonably thought to bring evil or harm to its people. *Kovacs v. Cooper,* 336 U.S. 77, 83, 69 S.Ct. 448, 451, 93 L.Ed. 513, 520 (1949).

The solicitations prohibited by the statute are not of a nature sought to be safeguarded by the Constitution. Under the First Amendment, protection is extended to the "communication of ideas or the discussion of issues." *Kovacs v. Cooper,* 336 U.S., at 89, 69 S.Ct., at 454, 93 L.Ed., at 523. A statement or activity, if it is to be entitled to protection, must bear some relationship to the freedom to speak, write, print or distribute information or opinion. *Schneider v. New Jersey,* 308 U.S. 147, 160-161, 60 S.Ct. 146, 150, 84 L.Ed. 155, 164 (1939). The First Amendment, according to Mr. Justice Holmes, guarantees liberty of human expression in order to preserve in

our Nation a free trade in ideas. *Abrams v. United States,* 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173, 1182 (1919) [dissenting opn].

The speech at issue, which by any community standard would be termed lewd if not obscene, cannot be termed a statement of opinion, an exposition of ideas, or a delineation of issues, but is rather a mere invitation to another to engage in an intimate, abnormal sexual act. Its content is of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1034 (1942).

Whereas, in *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), the Court concluded that the four-lettered sexually explicit epithet emblazoned on the defendant's jacket was a political statement which was neither erotic nor psychically stimulating, the speech here under litigation has as its sole purpose a consummation of sexual interests. The words themselves are not only wholly erotic but act to conjure up thoughts which are exclusively sexual.

In truth, as the record herein supports, much of the communication regulated is connected with or an integral part of the crime of prostitution. As such, it is entitled to absolutely no constitutional protection.

> ". . . it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834, 843-844 (1949).

Even were it to be assumed for purposes of discussion that in some cases the content of the solicitation under question is

protected to some degree, the context in which the words are uttered, i.e. public areas, prohibits the invocation of the First Amendment. As noted by the dissenting opinion in the Court of Appeals below, the focus of the statute is on public order; its intent is to prohibit an offensive accosting of another in the public forum. Not only is the solicitee exposed to a suggestion whose content is both intimate and lewd, but the circumstances are such that he cannot avoid the affront which such solicitation presents. The situation is similar to that described by the court in *Kovacs:*

> "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it . . . . [H]e is practically helpless to escape this interference with his privacy . . . except through the protection of the municipality." *Kovacs v. Cooper,* 336 U.S., at 86-87, 69 S.Ct., at 453, 93 L.Ed., at 522.

As recognized by the drafters of the Model Penal Code who recommended a statute almost identical to the one at issue:

> "The rationale for retaining this offense is not the regulation of private morality but the suppression of public nuisance. Persons who publicly seek or make themselves available for deviate sexual relations openly flout community standards. Moreover, indiscriminate solicitation in public streets, parks and transportation facilities is not only an affront to moral and aesthetic sensibilities; it is also a source of annoyance to, and harassment of, members of the public who do not wish to become involved. Section 251.3 is designed to protect the legitimate expectations of citizens in public places by proscribing this kind of annoying activity. For that reason the offense is not limited to loitering for hire, as is the case under Section 251.2 on prostitution." (Model Penal Code, §251.3, Comment, at p. 476).

Consideration should also be given to the fact that a reckless or indiscriminate public solicitation can elicit a response more volatile than mere embarrassment or offense. The person solicited is forced to publicly respond, even if only by an abrupt

avoidance of the solicitor. The public aspect of such a solicitation could escalate the degree of discomfort or agitation experienced by a solicitee beyond that which presumably would be experienced in a private setting. Violence or public disorder adversely affecting not only the participants but those in the vicinity of the solicitation as well, is but an extreme of the harm which could result from the public context of the solicitation.

The solicitations engaged in by the respondent Butler were clearly conducted absent any preliminary indication of receptiveness on the part of those solicited. Her actions in waving down cars randomly on the street evidenced an arrogant disregard for the right of others to proceed along public thoroughfares unharassed.

The overtures of the respondent Uplinger, although somewhat less drastic, were arguably equally indiscriminate. According to the complainant Officer Nicosia, he was pursued by Uplinger when he attempted to leave the area where he and Uplinger had been talking. Only at that time did Uplinger make reference to the sexual act which was his purpose. The solicitation was thus thrust upon Nicosia at a time when he appeared to be uninterested in further discussion.

The potential for public disruption intrinsic to such solicitations constitutes a rational justification for the State's desire to regulate such acts as they occur in public. To suggest as did respondents below that there are individuals receptive to discreet solicitations in public places bears negligibly upon considerations relating to context. Assuredly, even discreet solicitations to receptive solicitees can be a source of bother or genuine disturbance to those involuntarily cast into the position of having to overhear them.

**Compelling State Interest**

Notwithstanding that the speech at issue, based upon its content and its context, is not protected by the First Amend-

ment or at best only minimally protected, it is submitted that the State does have a compelling interest in regulating the solicitation of deviate sexual acts. The First Amendment's guarantee of free trade in ideas protects more than a person's freedom to say or write or publish what he chooses. It also secures the liberty of each person to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. *Ginsberg v. New York,* 390 U.S. 629, 649, 88 S. Ct. 1274, 1285, 20 L. Ed.2d 195, 209 (1968), (concurring opinion of Stewart, J.). By regulating public solicitation for deviate sexual activities, the State is acting upon its compelling interest in the protection of the right of an individual to choose not to hear on public streets solicitations of a lewd and intimate nature.[3]

It must be emphasized that the object of the statute under consideration is regulation of behavior occurring in a public place. However, because of the brief amount of time required to solicit another to perform a deviate sexual act, one who is solicited is of necessity a "captive audience" for the solicitor. In contrast to the situation presented in *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed.2d 125

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[3]Some nineteen states have laws similar to New York's which prohibit either loitering for solicitation or solicitation directly: Alabama: Crim. Code §13A-11-7(a)(3); Arizona: Crim. Code §13-2904; Arkansas: Ark. Stat. Ann. 41-2914; California: Pen. C.A. §647; Colorado: Col. Crim. Code §18-9-112; Delaware: Del. C. §11-1321; Georgia: O.C.G.A. §16-6-15; Kansas: K.S.A. 21-4108; Maryland: Ann. Code Art. 27 §15; Massachusetts: ALM GL c.272 §53; Michigan: MSA §28.570; Nevada: NRS §2)7.030; New Jersey: N.J.S.A. 2A:170-5; North Carolina: G.S. 14-204; Ohio: R.C. 2907.07; Oklahoma: 21 O.S. §1029; Oregon: O.R.S. 163-455; Rhode Island: G.L. 11-10-1; Wisconsin: WSA 947-02.

Five additional states have laws which prohibit sodomy or consensual sodomy and corresponding provisions which prohibit the solicitation to commit a crime: Montana: MCA 45-4-101, MCA 45-5-505; South Carolina: Code 16-1-40, Code 16-15-120; Tennessee: T.C.A. 39-1-401, T.C.A. 39-2-612; Utah: U.C.A. 76-2-202, U.C.A. 76-5-403; Virginia: Code of Va. 18.2-29, Code of Va. 18.2-361.

(1975), in which an individual could prevent any significant intrusion on his privacy by merely averting his eyes, the unreceptive individual who is indiscriminately solicited for a deviate sexual act, whether discreetly or not, suffers an unavoidable affront. His situation, as noted above, is similar to that of the unwilling listener in *Kovacs* who could not escape the opinions imposed upon him by others "by way of sound trucks with loud and raucous noises on city streets." Indeed, although the solicitee is on a public street, the degree of captivity which he experiences when confronted by one who wishes to solicit him is analogous to that of a bus passenger who is unavoidably subjected to advertisements in public buses. In *Lehman v. City of Shaker Heights,* 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed.2d 770 (1974), this Court upheld the city's denial of display spaces on public buses to political candidates, reasoning that the degree of captivity of one who must of necessity travel by bus makes it impractical for an unwilling viewer or auditor to avoid exposure.

In both *Kovacs* and *Lehman,* the speech which the Court allowed to be restrained was protected inasmuch as its content was political. In contrast, the speech at issue herein, judged in terms of its content, is entitled to little or no First Amendment protection.

Under the circumstances as presented by the instant case, not only is the person being solicited denied his right to avoid hearing an indecent proposal if he so wishes, but the street encounter further infringes upon his right to privacy to the extent that it compels him to respond to such proposal, however minimally, in the presence of acquaintances and strangers alike. His right to avoid a public incident pertinent to intimate sexual matters has been abridged whether the solicitor behaves in a discreet or indiscreet manner.

In addition, due to the content of the communication, the hearer is highly likely to experience embarrassment, annoyance

or harassment. The unquestioned constitutional legitimacy of state harassment statutes indicates that the state has a legitimate interest in ensuring that individuals be protected from undue public annoyance or disturbance. The statute at issue does not contain a requirement of criminal scienter; however, it is submitted that, under present community standards, in which indiscriminate solicitation in public streets is an affront to the moral sensibilities of most members of the public, sufficient notice has been given to those who wish to randomly solicit so as to justify a strict liability standard. As noted in the dissenting opinion in the New York Court of Appeals decision under review:

> "This statute embodies the Legislature's determination that public solicitation to engage in sexual conduct is necessarily offensive to others. While some may welcome such offers, there is nothing irrational in the Legislature's determination that the vast majority of people prefer to go about their everyday business without being stopped or solicited, especially when the solicitation involves offers to engage in the most intimate of activities.
>
> Nor is it irrational for the Legislature to have decided that the presence of people soliciting in public to engage in sexual conduct is in and of itself annoying." (App. B, 5b)

While such solicitation certainly can be offensive to an unreceptive adult, its effect on minors is cause for even greater concern. The state's vital and compelling interest in safeguarding the welfare of minors has been upheld in several cases relevant to the issues at bar. In *Ginsberg v. New York, supra,* this Court permitted the states to prohibit the sale to minors of material defined to be obscene on the basis of its appeal to young people whether or not it would be obscene to adults. In *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed.2d 1073 (1978), the Court found constitutional a regulation permitting the Federal Communications

Commission to prohibit the broadcast of indecent language which was clearly not obscene, based in part upon a determination that children may have unsupervised access to radio receivers. Finally, in *New York v. Ferber*, ____ U.S. ____, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982), the Court upheld a New York statute which prohibited the knowing promotion of sexual performances by children, whether or not such performances were obscene.

Just as the use of minors in sexual performances creates a potential harm to those who are the object of the sexual exploitation, so too is there a similar potential for harm to youths whose sexuality becomes the subject of street discussion. Arguably, a solicitation to engage in deviate sexual behavior is potentially more damaging to an impressionable young person than either the hearing of an indecent radio broadcast or the viewing of materials harmful to minors but not necessarily obscene to adults. Young people who have forced upon them a direct and personal proposition of a lewd and intimate nature are exposed to an attack upon their individual sexual identity. Conceivably, the detrimental impact extends even to the young person who is not directly solicited but who is forced by his or her mere presence to be an observer to such solicitation.

An additional and equally compelling aspect of the State's interest in minors concerns the welfare of those young persons who, whether as a result of coercion or voluntary choice, are involved as solicitors of deviate sex for payment. Criminalization of the act of soliciting serves to limit the exploitative use of minors for deviate prostitution by discouraging the free flow of such commercial activity. Although concededly there are other laws permitting the prosecution of deviate prostitution, it is submitted that such laws do not easily succumb to enforcement due to the problem of proving payment absent solicitation of an undercover police officer. Under the reasoning of *Ferber*, the exploitation of

minors for deviate prostitution, an activity of unquestioned illegality, cannot be immunized by resort to the protection provided to speech by the First Amendment. *Ferber*, ____ U.S. ____, 102 S. Ct., at 3357, 73 L. Ed.2d, at 1125.

Finally, it is argued that the State has a compelling interest in regulating activities which constitute a public nuisance when such nuisance damages both the character of a residential neighborhood and the viability of local commercial interests. Again it is noted that the activity which the State here attempts to prohibit is public and not private. The court below in its majority memorandum determined that the State had no basis upon which to punish loitering for conduct anticipatory to the act of consensual sodomy, a legal act. Not only does this position ignore the fact, as noted above, that the term "deviate sexual acts" includes acts whose illegality is unchallenged, but it provides no reasoning to support a conclusion that public solicitation for any deviate sexual act, legal or illegal, must be tolerated.

Despite the fact that sodomy conducted in private between consenting adults has been deemed legal, the State unquestionably has the power to prohibit acts of consensual sodomy in public places. *(See* New York Penal Law §245.00 dealing with Public Lewdness). Similarly, while a private overture to a receptive adult may be an activity protected by the First Amendment, such protection does not automatically extend to public solicitation.

That the solicitations at issue did in fact cause harm both to residents, even if unsolicited themselves, as well as to area businesses was shown by the testimony of persons living and working in the immediate area of the solicitations. Residents who were forced to view solicitations were concerned for the welfare of their children; business proprietors expressed concern about the stag lines of male prostitutes or solicitors whose presence served to intimidate customers. There were

complaints about the changing character of the neighborhood epitomized by the testimony of the district councilman who was himself solicited as he sat in his car waiting for his son to complete a tutoring session.

While often unprovable at this stage of activity, the solicitation is commonly part of a proposal for prostitution, a commercial activity presently prohibited by the State. As such, the speech falls clearly within the ambit of valid governmental regulation pertinent to the prevention of offenses deemed criminal. In the case of respondent Butler, the solicitation was followed by an act of sodomy performed in a car parked on the street. Prior to this act, the respondent was observed waving to cars and calling out to motorists. Where such activity is tolerated under the rubric of an individual's right to perform acts of consensual sodomy, prostitution activities will flourish unchecked. The State's interest in preventing the deterioration of a residential neighborhood, the concommitant decline of commercial and residential property values, and the increase in criminal activity, especially prostitution, is sufficiently compelling to justify some regulation of speech. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed.2d 310 (1976).

The regulation at issue can be compared to the regulation permitted by this Court in *Pacifica* in which the Court agreed with the petitioner that an offensive public broadcast "should be regulated by principles analogous to those found in the law of nuisance where the 'law generally speaks to channeling behavior more than actually prohibiting it.'" 438 U.S., at 731, 98 S. Ct., at 3031, 57 L. Ed.2d, at 1082. The law in the instant case similarly is directed toward removing solicitation from the public streets while not preventing its occurrence in non-public places such as private clubs catering to a clientele tolerant of alternative sexual behavior wherein one's presence may be considered an indication that such solicitation would not be offensive.

In sum, neither the content nor context of the speech here inhibited overcomes the State's obvious interest in providing for order in the community.

**Association**

It was argued by the respondent Uplinger in the Court of Appeals that the statute at issue was violative not only of free speech but also of his First Amendment right to freedom of association. Uplinger, an admitted homosexual, contended that, "[i]mplicit in the prohibition of Penal Law §240.35-3 is the effort to discourage [him] from meeting new people and, in the process, where he thinks it appropriate, to fully exercise his right of association by discreetly discussing with them in a public place, but in a private manner, the possibility of engaging in deviate sexual activities." (Appellant Uplinger's Brief to Court of Appeals, p. 60).

To the contrary, a ban on the solicitation of deviate sexual activities does not prevent persons who wish to pursue a homosexual lifestyle from meeting or associating publicly with others of like interests. Further, it does not prevent them from instituting conversations with strangers which permissibly could include a polite inquiry as to whether or not the stranger was himself a homosexual. Nor does the statute in any way prohibit public discussion among persons of any sexual orientation regarding matters which are of general concern, except only to prohibit a direct solicitation of another to engage in a deviate sexual act.

A public assemblage of any number of persons for the purpose of supporting or advocating the rights of homosexuals is clearly a protected activity which is not outlawed by the statute at issue. In addition, the statute imposes no restraint upon political statements in support of homosexuality or other sexual proclivities.

Insofar as the conduct not proscribed by the statute allows a person to identify others who would be receptive to a

solicitation, one can with relative ease establish a basis for a permissible private solicitation which does not harm members of the public who wish neither to be solicited nor to hear the solicitation of others. The right to assemble and associate freely with others is protected; it is only the specific act of solicitation as it occurs in public which is prohibited.

As was observed by the Court in *Coates v. City of Cincinnati,* 402 U.S. 611, 614, 91 S. Ct. 1686, 1688, 29 L.Ed.2d 214, 217 (1971), the government, by enacting and enforcing ordinances directed with reasonable specificity toward conduct to be prohibited, may prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. The statute herein, directed only toward prohibition of the public nuisance created by a lewd public solicitation, represents a rational attempt by the State to regulate annoying conduct on a public street.

**Overbreadth**

The scope of the First Amendment overbreadth doctrine is generally recognized as an exception to the rule against Constitutional challenges to a statute not based upon situations before the Court. However, a statute which reflects a close nexus between the means chosen by the Legislature and the permissible ends of government will not be struck down simply because occasional applications that go beyond constitutional bounds can be imagined. *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). As made explicit by this Court in *Broadrick,* the overbreadth rule will not be invoked in the absence of a *substantial* infringement upon protected activity:

> **". . . particularly where conduct and not merely speech is involved; we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S., at 615, 93 S.Ct., at 2918, 37 L.Ed.2d, at 842.**

Because the statute at issue is an attempt to regulate the behavior of those who would publicly loiter in order to solicit or to engage in deviate sexual acts, it clearly encompasses conduct as well as speech.

Respondents argued below that the statute, by design and in application, was overbroad inasmuch as it could apply equally to solicitations made in a deserted park or on a busy street; to solicitations made to strangers as well as to those known to the solicitor; and finally to solicitations made abruptly as well as to those following extended conversation. Petitioner contends that all such behavior, as long as it occurs in public, is a legitimate target of the statute.

It was the intent of the Legislature to protect persons in public areas from being subjected, either as solicitees or as involuntary witnesses, to lewd suggestions for sexual activity. A person solicited in a deserted park can as readily experience embarrassment or offense as one solicited on a busy street. A public solicitation by one known to the solicitee can be as unwelcome, or potentially more unwelcome, than one made by a stranger.

The only imaginable situation falling outside the intent of the statute would involve a discreet and inoffensive solicitation at a deserted public location between participants who are receptive to the suggested sexual activity. The number of instances in which the statute would be applied to such a situation is undeniably small in comparison to the number of instances of unprotected behavior which are the law's legitimate objects.

As concerns the legislative purpose, it is significant that the activity here attempted to be regulated is generally interspersed with, and a part of, both male and female prostitution activities. The respondent Butler, a prostitute, was seen waving down passing cars on a public thoroughfare. She was subsequently arrested while committing an act of fellatio upon a male on a public street. While no proof was presented with respect to payment, logic compels the inference that an ex-

change of money was part of the transaction. The record of the hearing held upon the charge against respondent Uplinger did not provide evidence of monetary payment; however, that same record did demonstrate a substantial incidence of male prostitution activities in the very area where Uplinger was arrested.

The conclusion to be drawn from the factual circumstances of these cases is that a significant amount of the speech sought to be prohibited relates to illegal activity. As such, this speech is subject to no constitutional protection. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949). Beyond the fact that the speech pertains to matters wholly illegal, its commercial character renders it immune to challenge on the basis of overbreadth. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-381, 97 S.Ct. 2691, 2707-2708, 53 L.Ed.2d 810, 834 (1977).

Facial invalidation of a statute based upon an overbreadth analysis must be carefully tied to the circumstances in which it is truly warranted, must be employed with hesitation and only as a last resort, and must involve a substantial overbreadth. *Broadrick v. Oklahoma, supra.* It is submitted upon these criteria, that the New York statute at issue is not even remotely subject to such constitutional invalidation.

**Underinclusiveness**

In the courts below, respondents sought to invoke a declaration of unconstitutionality based upon the underinclusiveness of the statute, claiming that the Legislature's failure to regulate solicitations for normal sexual intercourse in the same manner as solicitations for deviate sexual intercourse rendered the statute fatally underinclusive. **Because of the unprotected or minimally protected nature of the solicitations themselves, and the rational state purpose in differentiating between normal and abnormal sexual acts, the statute may not be deemed unconstitutionally underinclusive.**

It is argued that in view of this Court's recent decision in *New York v. Ferber*, ____ U.S. ____, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the concept of underinclusiveness is inapplicable to the statute in question. At issue in *Ferber* was a criminal statute, New York Penal Law §263.15, which prohibited the promotion of performances involving sexual conduct of a child. Finding that the New York Legislature had failed to similarly proscribe the promotion of performances including other conduct dangerous to the health or well-being of a child, the New York Court of Appeals found the statute "strikingly underinclusive" in light of *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). The holding in *Erznoznik*, involving a Jacksonville city ordinance, was distinguished:

> "18. *Erznoznik* * * * struck down a law against drive-in theaters showing nude scenes if movies could be seen from a public place. Since nudity, without more is protected expression, *id.*, at 213, we proceeded to consider the underinclusiveness of the ordinance. The Jacksonville ordinance impermissibly singled out movies with nudity for special treatment while failing to regulate other protected speech which created the same alleged risk to traffic. Today, we hold that child pornography as defined in §263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclusive or unconstitutional for a State to do precisely that." ____ U.S. ____, 102 S.Ct. at 3359, 73 L.Ed.2d at 1128, n. 18.

Since the conduct sought to be regulated by New York's loitering statute, like child pornography, is not entitled to protection and is subject to regulation, particularly in view of the compelling state interest, the statute cannot be deemed fatally underinclusive.

The decision of the New York State Legislature to make the loitering provision applicable only to acts or solicitations involving "deviate sexual intercourse or other sexual behavior of

a deviate nature" represented a conscious legislative determination. As originally proposed, the statute would have prohibited solicitations to engage in both deviate and normal sexual acts.[4] It was considered that such solicitations were unsalutary or unwholesome from a social viewpoint.[5] In amending the language of the provision so as to only proscribe solicitations to engage in deviate sexual acts, the Legislature consciously stated its conclusion that such solicitations were palpably more obtrusive.

Although the New York Court of Appeals here conceded that the Legislature could enact a statute prohibiting one from accosting in an offensive manner or in an inappropriate place, or from soliciting another to perform the act in a public place, it held that the absence of a requirement that the conduct be offensive or annoying to others rendered the loitering statute deficient. Statutes governing conduct which offends or annoys already exist in New York and punish at the same level of offense as the loitering provision. New York Penal Law §240.20, Disorderly Conduct,[6] applicable to conditions of-

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[4]Study Bill, Senate Int. 3918, Assembly Int. 5376, 1964 Legislative Session, Section 250.15-3: "A person is guilty of loitering when he: . . .3. Loiters or remains in a public place for the purpose of committing, attempting to commit, or solicitng another person to commit a lewd or sexual act . ."

[5]See Commission Staff Notes, Article 250, pages 387-388, appended to Study Bill, *supra*.

[6]§240.20 Disorderly conduct.
A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:
• • •
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or • • •
5. He obstructs vehicular or pedestrian traffic; or • • •
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.
Disorderly conduct is a violation.

fensive to the public, and Penal Law §240.25, Harassment,[7] applicable to conditions offensive to an individual, already regulate the type of conduct which respondents here allege is uncontrolled.

What New York has established is not a statutory framework which fails to punish solicitations for normal sexual activity, but one in which such punishment is premised upon proof of an additional element of inconvenience, annoyance or alarm. That the loitering statute is framed in terms of strict liability merely reflects the valid legislative judgment that "deviate sexual intercourse or other sexual behavior of a deviate nature" is presumptively more offensive to the greater portion of the public. Such is a rational legislative determination and does not give rise to a sustainable claim that the loitering statute on its face is underinclusive.

The argument presented by respondent Uplinger to the effect that the statute under consideration may be underinclusive because it fails to subject married persons to the prohibition against public solicitation, reflects an improper assessment of the Legislature's objective in promulgating this statute. The Equal Protection Clause of the Fourteenth Amendment denied to the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. *Eisenstadt v. Baird,* 405 U.S. 438, 448, 92 S.Ct. 1029, 1035, 31 L.Ed.2d 349, 359 (1972). However, classifications are

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[7] §240.25 Harassment.

A person is guilty of harassment when, with intent to harass, annoy or alarm another person: • • •

2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or • • •

5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Harassment is a violation.

permitted where they are reasonable, not arbitrary, and where they rest upon some ground or difference having a fair and substantial relation to the object of the legislation.

A primary objective of the State in prohibiting loitering for the purpose of soliciting deviate sexual acts is to protect members of the public from being harassed by indiscriminate solicitations of a lewd and intimate kind made by persons whom the solicitee neither knows nor seeks to know. It thus reflects a concern for an individual's right to a modicum of privacy, even in a public place, especially as it relates to intimate sexual matters.

Because of the intimate relationship that exists between persons who are married, the danger of an indiscriminate intrusion upon spousal privacy is not a harm which this statute need address. It should be recognized, however, that the statute does not allow *carte blanche* solicitations between married individuals on a public street. Their solicitation of each other for deviate acts other than sodomy is clearly proscribed. Given the degree to which the marital relationship with its concomitant right to privacy is protected by our society, (*Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)), a classification which exempts married persons from prosecution for solicitation of one another for legal but not criminal sexual acts is not unreasonable.

**Vagueness**

Only last term, this Court in *Kolender v. Lawson,* ____ U.S. ____, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), reaffirmed the basic constitutional principle that "[o]ur Constitution is designed to maximize individual freedoms within a framework of ordered liberty." ____ U.S. ____, 103 S.Ct., at 1858, 75 L.Ed.2d, at 909. Implicit within that framework is the concept that a criminal offense be defined "with sufficient definiteness that ordinary people can un-

derstand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* In *Colten v. Commonwealth of Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972), this Court further characterized the vagueness doctrine:

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky court when it said: 'We believe that citizens who desire to obey the statute will have no difficulty in understanding it . . . ' " 407 U.S., at 110, 92 S.Ct., at 1957, 32 L.Ed.2d, at 590.

Measured against these collective standards, New York Penal Law §240.35 subd. 3 satisfies all constitutional criteria.

Both respondents contended in the courts below that the statute proscribing loitering was unconstitutional due to the inherent vagueness of the phrase "deviate sexual intercourse or other sexual behavior of a deviate nature." Although conceding that "deviate sexual intercourse" is appropriately defined in Penal Law §130.00 subd. 2, they nonetheless claimed that the remainder of the phrase, "other sexual behavior of a deviate nature" is not susceptible to adequate definition.

All that is constitutionally required is that the statute "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222, 227 (1972). Since, as noted earlier, the words "other sexual behavior of a deviate nature" are keyed to a concept which has a clear, common understanding, i.e. sexual abnormality, the statute is not plagued by any uncertainty which would place an unwarranted amount of

discretion in the hands of the police, judges or juries. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

Given the limitations of language in general, and the inability to prospectively catalogue every activity which a solicitor might seek to foist upon the public, the statute satisfies constitutional standards. In *United States v. Petrillo,* 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947), involving the construction of a statute utilizing the phrase "number of employees needed," this Court noted as follows:

> "The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." 332 U.S., at 7-8, 67 S.Ct., at 1542, 91 L.Ed., at 1883.

The precision of the New York legislative enactment under consideration is abundantly demonstrated, particularly with respect to the acts involved here. In the present case, both respondents had either engaged, or offered to engage, in conduct which involved contact between mouth and penis, conduct clearly embraced by the terms of the statute. Neither respondent claimed below that they had no way of knowing that their conduct was proscribed by the statute or that they were uncertain as to its limits.

More importantly, however, since the conduct committed by each clearly fell within the terms of the statute, neither has standing to assert a claim that the statute is void for vagueness. In *United States v. Wurzbach,* 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930), a representative to Congress challenged the validity of a statute which prohibited a Senator or Represen-

tative, among others, from soliciting or receiving political contributions from Federal officers or employees. This Court stated as follows:

> "It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by some one whom it concerns." 280 U.S., at 399, 50 S.Ct., at 169, 74 L.Ed., at 510.

More recently, this Court had the opportunity to review a due process claim in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976), where the vagueness of a municipal Anti-Skid Row Ordinance was called into question. The ordinance provided, in part, that an adult theater, distinguished by an emphasis on specified sexual activities or specified anatomical areas, could not be located within 1000 feet of any two other regulated uses. The owners contended that the statute was impermissibly vague in that 1) they could not determine how much of the described activity was permissible before the exhibition was "characterized by an emphasis" on such matter, and 2) the ordinance did not specify procedures or standards for obtaining a waiver of the 1000 foot restriction. In finding that "[t]he application of the ordinances to respondents is plain," 427 U.S., at 61, 96 S.Ct., at 2448, 49 L.Ed.2d, at 321, this Court noted:

> "We find it unnecessary to consider the validity of either of these arguments in the abstract. For even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. The record indicates that both theaters propose to offer adult fare on a regular basis. Neither respondent has alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater. It is clear, therefore, that any element of vagueness in these ordinances has not affected these

> respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected." 427 U.S., at 58-59, 96 S.Ct., at 2446-2447, 49 L.Ed.2d, at 319.

Since the conduct attributable to both Butler and Uplinger is clearly embraced within the statute, neither is what might be called an "entrapped innocent." (*See* L. H. Tribe, American Constitutional Law, 718-719 (1978)). Neither, therefore, has standing to raise the issue of vagueness.

Both facially and as applied to the respondents at bar, New York's loitering statute represents a clear and concise attempt to regulate offensive conduct in public and should not be deemed unconstitutional as an impermissibly vague enactment.

## CONCLUSION

**THE JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS SHOULD BE REVERSED.**

Respectfully submitted,

RICHARD J. ARCARA
*District Attorney*
*Erie County*
*Attorney for Petitioner*
200 Erie County Hall
25 Delaware Avenue
Buffalo, New York 14202
(716) 855-2424

JOHN J. DeFRANKS
LOUIS A. HAREMSKI
JO W. FABER
*Assistant District Attorneys*
*Of Counsel*